Supreme Court, U.S.
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No. 06-1015

In the Supreme Court of the United States

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

PHILLIP L. KEPHART,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

A. Respondent does not respond to many of the points made in the petition.

What is perhaps first striking about the brief in opposition is that respondent ignores and does not take issue with many of the central points made in the petition for a writ of certiorari. That is, what is first notable is not what the brief in opposition says, but what it fails to address.

The petition notes that the Ninth Circuit Court of Appeals treated respondent Kephart as though he were proceeding *pro se*, stating that it was "highly relevant" that he was "proceeding *pro se*," and on that basis "construe[ing] [his] allegations regarding diligence liberally." *Roy v. Lampert*, 455 F.3d 945, *amended* 465 F.3d 964, 970 (9th Cir. 2006).[1] The Ninth Circuit did so even though Kephart had been represented by counsel for about two and a half years when the district court's judgment was entered, and even though counsel was allowed to and did submit additional evidentiary materials in support of Kephart's equitable tolling claim. (Pet. Cert. 11). The State's petition contends that treating Kephart as though he were *pro se* in this circumstance is unprecedented, conflicts with the approach taken by this Court in *Baldwin Co. Welcome Center v. Brown*, 466 U.S. 147, 150 n. 4 (1984), and could result in significant and adverse impacts on habeas corpus practice in the circuit because Kephart's situation – initially filing *pro se* and then having counsel appointed – is

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[1] As the petition mentions, the Ninth Circuit on its own motion consolidated the appeal in this case with the appeal in *Roy v. Lampert*. *See Roy*, 465 F.3d at 967. The State's petition for rehearing and suggestion for rehearing *en banc* was limited to Kephart's case only, as is the State's petition for a writ of certiorari.

such a common one. Respondent offers no defense of this Ninth Circuit holding. He never mentions it in the brief in opposition.

The Ninth Circuit also held, based on the most conclusory of allegations, that Kephart was entitled to an evidentiary hearing on his claim of equitable tolling. The petition asserts that the Ninth Circuit's approach, rewarding meager and unspecific allegations with an evidentiary hearing, is inconsistent with the more-demanding standards employed by the Second, Third, Seventh, and Eleventh Circuits. (Pet. Cert. 17-19). Respondent does not appear to disagree that there is a conflict. This claim too is not addressed in his brief in opposition.

Finally, the petition argues that the Ninth Circuit so reduced the diligence component of an equitable tolling claim as to render that aspect of a claim virtually meaningless. (Pet. Cert. 19-20). The insufficient showing approved by the Ninth Circuit conflicts with the more stringent approach taken by the Fifth, Tenth, and Eleventh Circuits, which in turn are not consistent with each other. (Pet. Cert. 21-24). The State's petition identifies and describes the three disparate courts of appeals' approaches to claims of equitable tolling in federal habeas corpus that are based on allegations of inadequacies in prison law libraries and on lack of access to legal materials, as this case is. (Pet. Cert. 23-24). Respondent does not reply to or dispute that claim either. He does not contend that there is no conflict.

Thus, the circuit conflicts highlighted in the petition for a writ of certiorari stand unaddressed and unrebutted by respondent. And respondent offers no defense of the Ninth Circuit's treatment of a long-counseled habeas petitioner as if he were *pro se*.

B. Respondent's arguments about the showing required for an evidentiary hearing and about what constitutes diligence are case-specific and largely irrelevant.

As noted above, the petition asserts that, assuming equitable tolling is available at all, the Ninth Circuit set the bar for obtaining an evidentiary hearing on such a claim far too low and that the court diluted the diligence component of an equitable tolling claim. The petition also argues that the Ninth Circuit's approach to these issues conflicts with the analytical approach used by other circuit courts of appeals. (Pet. Cert. 16-24). Rather than disagreeing that there is a circuit split, respondent offers much more case-specific and myopic contentions.

Respondent first complains that, "[i]n the courts below, the state did not cite a single case of a similarly situated Oregon inmate," transferred to an out-of-state privately-run prison facility and then returned to an Oregon institution, "who filed [his federal habeas corpus petition] within the statute of limitations." (Opp. Br. 4). Why that should matter when the State's objections are to the Ninth Circuit's legal analysis is unclear. Respondent also contends that "no Oregon prisoner sent to Arizona filed a timely, non-defaulted federal petition." (Opp. Br. 4). But the only evidence he offers in support of that assertion is a citation to a district court case involving an Oregon inmate, sent to Arizona, who filed his federal habeas petition *on time*, but whose claims were procedurally defaulted. (Opp. Br. 4, citing *Griffen v. Johnson*, No. 98-888 (D. Or. 2000)).

Respondent next contends that, if this case were truly worthy of certiorari, the State would have sought the issuance of a writ in Roy's case too. (Opp. Br. 4-5). Seeking the issuance of a writ in Kephart's case only is all that is needed to put the legal issues the State wishes to advance before this Court, however. There is no need to add Roy's case to the mix. And

the "strategic selection" of Kephart's case as the vehicle to use to raise t[illegible]road-based legal issues the State is interested in is not particularly mysterious. Without conceding that Roy is in any way entitled to relief in habeas corpus, and without agreeing with the Ninth Circuit's holding that he is entitled to an evidentiary hearing on his equitable tolling claim, nevertheless his equitable tolling claim appears to be somewhat stronger than Kephart's. *See Roy,* 465 F.3d at 970-71 (Roy complained to the State corrections ombudsman about the legal resources available at the Arizona facility; he met with the ombudsman in Arizona to complain about the law library; and he filed a federal lawsuit while in Arizona challenging the acceptability of the law library); *Howell v. Mahoney*, 2006 US Dist LEXIS 92856, *6-7 (D. Mont. 2006) (citing those aspects of *Roy* as suggesting diligence); *Moreno v. Harrison,* 2006 US Dist LEXIS 62635, *23 (N.D. Cal. 2006) (same). And the facts can make a difference even when it is legal issues that are at the forefront. That is all that is signaled by the State's "strategic selection," as respondent puts it. (Opp. Br. 4).

Respondent faults the State for what he contends is "an unfounded prediction concerning the impact of the Ninth Circuit's decision in *Roy*." (Opp. Br. 5). Although the State contends that "the *Roy* decision will 'adversely affect the States in the circuit,'" leading "'to many unnecessary and, for the States, time consuming and expensive evidentiary hearings,'" (Opp. Br. 5, quoting Pet. Cert. 11), according to respondent "[t]hat forecast is wholly inaccurate." (Opp. Br. 5). For that assertion, respondent relies on (1) general statements of law made in other, earlier Ninth Circuit decisions, (2) the fact that, since *Roy*, in only one district court case citing *Roy* did the court order an evidentiary hearing on equitable tolling, while in another "the court found equitable tolling based on the paper record alone," and (3) the claim that district courts in the circuit do not often grant evidentiary hearings. (Opp. Br. 6-9).

All of those claims, even if accurate, miss the mark.[2] The State's complaint is not with broad statements of law that the Ninth Circuit has made in other, earlier cases, but with the legal analysis employed by the court in this case and with the adverse impacts on the States and on federal habeas practice that may result from this decision. And, given that the Ninth Circuit issued its amended opinion in this case only a little over five months ago, and that it may take awhile for the court's decision actually to result in more evidentiary hearings that lead to written decisions, the lack of such decisions at this point is neither surprising nor comforting to the State. In any event, even accepting respondent's assertions, the decision in *Roy* has already led to one evidentiary hearing on equitable tolling and one district court decision finding equitable tolling without an evidentiary hearing. If the district courts in the circuit were as unlikely to grant evidentiary hearings on claims of equitable tolling before *Roy* as respondent suggests, then respondent's post-*Roy* statistics hardly alleviate the State's concerns.

Thus, in the face of the State's complaints that the Ninth Circuit made it too easy to obtain an evidentiary hearing on equitable tolling and that it set the bar too low for the diligence component of such a claim, and in the face of the State's arguments that the Ninth Circuit's approach conflicts with that of other circuit courts of appeals, respondent offers only case-specific and largely irrelevant responses.

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[2] Respondent contends that "[r]esearch indicates that in the Districts of Oregon and Washington, there never has been a hearing on equitable tolling of the AEDPA statute of limitations." (Opp. Br. 7). He offers no support for that assertion.

C. Equitable tolling is not available to excuse the untimely filing of section 2254 habeas petition.

In its petition, the State argued that equitable tolling is not available to excuse the otherwise untimely filing of a federal habeas corpus petition brought under 28 U.S.C. § 2254. (Pet. Cert. 13-16). In an *amici curiae* brief, 32 other States join in that contention and urge this Court to grant certiorari to consider that significant legal issue.

Respondent replies that the State did not raise that issue below. (Opp. Br. 9-10). The State candidly admitted as much in its petition. (Pet. Cert. 13-14 n. 7). The State's failure to have raised the issue earlier does not preclude this Court's review. In the first place, in this case the Ninth Circuit, relying on that court's earlier precedent, held that "the AEDPA statute of limitations provisions * * * can be subject to equitable tolling." *Roy*, 465 F.3d at 969, citing *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (*en banc*). It is "the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed *or passed upon* in the courts below." *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted; emphasis added). Here, the Ninth Circuit "passed upon" the issue of whether equitable tolling is available in this federal habeas corpus context.[3]

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[3] Moreover, it would have been futile for the State to have challenged the court's earlier decisions. The court simply would have relied on them.

In addition, and even if the State's failure to have raised the issue below meant that it could not directly raise the issue now, if this Court were to grant certiorari on some other question or questions presented in the State's petition, the Court could consider the additional legal issue of the availability of equitable tolling in a section 2254 case. Once this Court's jurisdiction has attached, "consideration of issues not present in the jurisdictional statement or petition for certiorari *and not presented in the [lower court]* is not beyond [the Court's] power, and in appropriate circumstances [the Court] ha[s] addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980) (emphasis added). It would be appropriate to discuss this important legal issue here because of the significant interest that the States, habeas petitioners, and lower federal courts have in the issue, and because it logically underlies the other issues involving equitable tolling that are raised in the petition.

The cases on which respondent relies as indicating that the State cannot pursue the issue of the availability of equitable tolling are inapposite. Respondent cites *Baldwin v. Reese*, 541 U.S. 27 (2004) (Opp. Br. 10), but there the Court observed that "[u]nder this Court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.'" *Id.*, 541 U.S. at 34. That rule, and that holding, do not apply here.[4] Respondent also cites *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). (Opp. Br. 10). In that case, the Court held that an issue not raised by a respondent in the courts below was "waived." *Id.*, 537 U.S. at 56 n. 4. Nothing in the Court's opinion suggests that the courts below had ruled on the issue, however, and that fact distinguishes this case from that one.

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[4] Moreover, in *Reese* the Ninth Circuit had not passed on the issue that respondent raised in his merits brief. *Id.*

Finally, respondent relies on *Roberts v. Galen of Va., Inc.*, 525 U.S. 249 (1999) (*per curiam*). (Opp. Br. 10). There, this Court refused to consider two alternative grounds for affirmance offered by the respondent because they "do not appear to have been sufficiently developed below for [the Court] to assess them." *Id.*, 525 U.S. at 253-54. Because the equitable tolling issue here is a legal one, there is no factual record that needed to be "sufficiently developed below." Thus, this decision too is inapplicable.

On the merits of the State's claim that equitable tolling is not available in a case brought under section 2254, respondent contends that "[i]t is well settled that the statute of limitations is subject to equitable tolling." (Opp. Br. 11). If that were true, this Court would not have twice pointed out, the last time quite recently, that this Court has not yet ruled on the issue. *Lawrence v. Florida*, ___ U.S. ___ (2/20/07) (slip op. 8) ("We have not decided whether § 2244(d) allows for equitable tolling," but assuming it does because the parties proceeded on that assumption); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n. 8 (2005) (same). Moreover, although respondent is correct in asserting that there is no circuit split on the issue (Opp. Br. 11), that hardly offers any solace to the States if the circuits that have ruled on the issue have all gotten it wrong, leading to much unnecessary litigation over the precise contours of equitable tolling in the habeas corpus setting.

Respondent also contends that this Court's decision in *United States v. Brockamp*, 519 U.S. 347 (1997), relied on by the State in its petition (Pet. Cert. 15-16), is inapplicable and "has nothing to say" in this context because it is about tax law and because habeas corpus is an equitable remedy. (Opp. Br. 11-12). Respondent misunderstands the basis for the State's reliance on *Brockamp* and why it is significant here. The important teaching of *Brockamp* is, as this Court later stated in *United States v. Beggerly*, 524 U.S. 38, 48 (1998), that

"[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." The State's point is not that *Brockamp* (or *Beggerly,* which respondent ignores) is directly applicable here, but that the text of section 2244(d) also is inconsistent with equitable tolling and that the lower federal courts that have ruled that equitable tolling is available have failed to give due attention to the statutory text. *See Brockamp*, 519 U.S. at 351-52 (relying on the "explicit exceptions" to the time limits set out in the statute and on the statute's detail); *Beggerly,* 524 U.S. at 48 (concluding that equitable tolling is inconsistent with the statute at issue there, in part because the statute effectively already provided for equitable tolling because it started the clock running when the plaintiff knew or should have known of the claim).[5]

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[5] 28 U.S.C. § 2244(d)(D) states that the limitations period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." The statute is set out in full in the petition. (Pet. Cert. 2-3).

CONCLUSION

For the reasons set out in the petition and in this reply brief, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below.

Respectfully submitted,

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